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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 565

RUTH LOUGHRAN
Petitioner

vs.

JOHN LOUGHRAN, JOSEPH LOUGHRAN, AND CHARLES LOUGHRAN,
Trustees of the Estate of Daniel Loughran, Sr.
Respondents

REPLY BRIEF OF APPELLANT

ROBERT H. McNEILL,
Attorney for Petitioner.

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I

RESPONDENTS' INCONSISTENT POSITIONS

This reply is submitted to draw the Court's attention to the unwarranted and inconsistent position now

taken by respondents in their brief filed herein entitled "Brief for Respondents."

Neither in the transcript of record nor in the hearing before the Trial Justice, nor in the Court of Appeals, nor before this Court, in their "Brief for Respondents in Opposition to the Petition for Writ of Certiorari" did the respondents ever suggest any defect of jurisdiction in the Trial Court, or in the Court of Appeals, or in this Court until they did so in their brief filed in this Court a few days ago. Then for the first time (Respondents' brief, page 14, paragraph IV) was the suggestion made that the decree herein passed by the Trial Justice, should not have been entered *without evidence*.

Even if there were any merit in this point it will not be considered now since it would be utterly inconsistent with an orderly administration of justice. Such has been the rulings of this Court in innumerable cases, only a few of which will be referred to.

In the case of *Halbert vs. United States*, 75 Law Ed. 1294, opinion by Mr. Justice Van Devanter, this Court said:

> "So far as can be determined from the record the district court rightly applied the rules stated in this opinion. The record does not purport to contain, and evidently does not contain, all the evidence that was produced on the hearing. The statement of it was prepared by counsel for the government and the certificate is that the statement contains 'all the evidence essential to the decision of the questions presented by the appeal of the defendant.' The assignment of errors, which was then before the district court, does not challenge the decision of any question of fact, but

only rulings on questions of law. It is thus rather plain that the statement of evidence contains only so much of the evidence as was deemed essential to the decision of the latter. *We now are asked to consider questions not raised by the assignment of errors and which cannot be properly decided without appropriate assurance that the record contains all the evidence that is material to their decision. We must decline to consider them*" (Italics ours).

In the case of *Bradley vs. Public Utilities Company*, 77 Law Ed. 1057, a contention was made that a certain order of the Interstate Commerce Commission was void because supported by insufficient evidence. No such point was made in the Trial Court. In passing on the proposition this Court said:

> "Moreover, no such objection is set forth in the statement as to jurisdiction filed pursuant to Rule 12."

Therefore, the point was refused consideration.

In the case of *Wood vs. Wilbert's Sons Shingle & Lumber Company*, 57 Law Ed. 265, the Court said:

> "There are some minor questions presented by the brief of counsel of which we must first dispose. It was contended in the court below that appellees, by entering a formal appearance, waived their right to object to the jurisdiction. But they at the same time filed an exception to the jurisdiction, and the district court decided that the two papers should be considered together, and, so considering them, held that they could not be regarded as a consent on the part of the defendants to submit themselves to the jurisdiction of the

court. The ruling is not asigned as error. It is urged further that neither the exception nor the demurrer complied with the thirty-first equity rule, in that the appellees did not make affidavit that they were not interposed for delay. *It is sufficient to answer that the objection was not made in the court below and is not assigned as error on this appeal. We therefore pass to the consideration of the question certified*" (Italics ours).

It is too late to raise a point if not covered by an assignment of error (as here) and review is limited to errors assigned.

Connell Bros. Co. vs. Diedrichsen & Co., 213 Fed. 737, 130 C. C. A. 251.

Parties may not change their position on appeal and present questions not presented below.

Pope vs. United States, 289 Fed. 313.

To similar effect see *Gustav Holgren vs. U. S.* 54 Law Ed. 861.

In the case of *Old Nick Williams Co. vs. United States*, 215 U. S. 541, this Court said:

". . . errors not assigned will be disregarded . . ."

In 2 *Ruling Case Law*, p. 159, section 154, the general rule as to the necessity for giving the lower courts opportunity to pass upon questions relied upon is stated.

"NECESSITY FOR ASSIGNMENT—It is

> well recognized that the appellant must assign errors relied on for reversal; for the purpose of informing the appellate court and the adverse party of the matters relied on as error. This rule is applicable in the case of an appeal from an intermediate appellate court, and in order to have its action in dismissing an appeal reviewed, such action must be assigned as error. In accordance with this principle a question not presented by an assignment of error as required by the rules of the court will not be reviewed. This has been held to apply to all cases, whether they involve questions that have been passed on by the trial court, or new questions that may be raised for the first time on appeal, such as the failure of the complaint to state a cause of action."

The above represents the uniform holdings of this Court. In certain exceptional cases, to avoid some grave injustice, this court may notice a plain error not assigned or specified to the end that some principle of abstract justice may be preserved.

In the Court below the fullest opportunity was afforded appellants (respondents) to object to the sufficiency of the pleadings and to except to the court's passing the decree appealed from. No such exception was taken. The respondents acquiesced in the court's action and appealed from the decree on other grounds, to wit: that the decree gave to the petitioner rights in her husband's estate alleged to be denied to her by Code Section 966. No other grounds were stated. See assignment of errors (Record p. 27 and 28). The same position was taken in the brief of respondents in the Court of Appeals. Thereafter the same position was taken in this court in the *brief for respondents in opposition to the petition for writ of certiorari*. No men-

tion of a want of jurisdiction in the Trial Justice to pass the decree appealed from was made in that brief. No mention of the point was even made. Neither the Trial Justice nor the Court of Appeals had an opportunity to pass on the proposition.

No issue involving the power of the Court to pass the decree was raised, until the case reached this Court by certiorari when the point was first suggested in respondents' brief filed a few days ago.

In the case of *J. E. Hathaway & Co. vs. United States*, 63 Law Ed. 707, the court, speaking by Mr. Justice Brandeis, at page 709 said:

> "Third. Claimants further contend that the credit of time allowed by the government on account of the extra-work should have been greater. *On this matter no issue appears to have been raised below, and it is obviously not open for review here*" (Italics ours).

The propriety of the action of counsel for respondents in requesting the court to consider a matter never before presented to the trial court, the Court of Appeals, or to this Court is here pertinent. It has been shown that by the unanimous opinions and decisions of this Court that such contention should not be brought here for consideration, unless the same has been previously presented to and frankly and fully stated to the tribunals hearing the case prior to its reaching the Supreme Court.

Another complete negative reversal of position by the respondents is found in their brief herein filed. Heretofore they have relied upon the decision of the Court of Appeals of this jurisdiction in the case of

Olverson vs. Olverson, 54 Apps. D. C. 48. In their brief herein that case is merely mentioned in a citation with fifteen other cases. Obviously, this submergence of the case of Olverson vs. Olverson is because of its utter inapplicability as an authority in support of the decision herein. As stated in our *petition and brief for writ of certiorari* herein, every substantial principle governing marriage, as declared in the Olverson case, is diametrically different in its application from the instant case. These striking differences are set out in full in our discussion of the Olverson case (pages 33, 34 and 35 our *petition and brief*). It is not surprising that respondents have abandoned this case as an authority. The amazing thing is that the Court of Appeals in deciding unfavorably upon petitioner's contention herein said that this case was ruled by the decision in the Olverson case, when, as stated in our brief herein on page 33,

> "Every principle that justified the Olverson case is absent in the present case."

II

SUPPLEMENTAL AUTHORITIES

As the record herein disclosed, the marriage of petitioner, under which she claims participation in her husband's estate in the District of Columbia, occurred in the State of Florida. In a recent investigation of the decisions of the State of Florida, as to the marital status of persons at one time residing in Florida who thereafter removed therefrom and married elsewhere and later claimed interests in lands and properties in

Florida, we have read with much interest the decision of the Supreme Court of Florida in the case of *Whittington vs. McCaskill*, 65 Fla. 162; 61. So. 236, and submit the following analysis of the decision in that case.

Elizabeth Anderson, the daughter of the plaintiff, who had one-eighth or more negro blood in her veins, departed this life intestate, seized of the land in question; after acquiring title to the land Elizabeth Anderson moved to Leavenworth, Kansas, where she married W. J. Grooms, a white person, with whom she lived six years. She died there. After her death her husband, W. J. Grooms, as her only heir at law, conveyed the property to the defendant.

The Court stated the question presented, as follows:

> Q. "As we understand it, the sole point presented for our determination, as it will be decisive of this case, is as to whether or not the marriage between Elizabeth Anderson and W. J. Grooms in the State of Kansas, where such marriages are recognized as valid, will be held invalid in this State, so as to prevent Grooms from inheriting as the sole heir at law of Elizabeth Anderson . . ."

The statute of Florida prescribed:

1. Marriages between white and negro, or white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited.

2. Unlawful for any white male person residing or being in this state to intermarry with any negro female person; unlawful for any white female person residing or being in this state to intermarry with any negro male person; every such marriage solemnized

in contravention of this section shall be null and void, and the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving any estate by inheritance.

The statute makes it a felony for violation of the foregoing section.

Plaintiff contended that the foregoing made it impossible for Grooms to inherit from his wife. Florida statute provided for his inheritance as follows: *Sec.* 2295, *Gen. Sts.* 1906:

> "If there be no children or their descendants, and the decedent be a married woman and her husband survive her, all the property, real or personal, shall go to the husband."

Held:

> "We are of the opinion that this quoted section of the Constitution and the two quoted statutes fail to support this contention. To hold otherwise we would have to read something therein that is not there. Neither Grooms nor Elizabeth Anderson resided or was in this State at the time of their marriage, nor did they reside therein subsequent thereto. Neither does it appear that she removed from Florida for the purpose of contracting such marriage with the intent to evade our statute . . . Since the marriage was valid in the State of Kansas, where it was consummated and where the parties continued to reside until the death of the wife, we are of the opinion that neither our Constitution nor the statutes, referred to above, have any applicability thereto."

It will be noted that the Supreme Court of Florida

recognized and declared valid the marriage of the two persons involved in said cause, although had the marriage occurred in Florida it would not only have been illegal, but criminal, the marriage being one between a white person and a negro. Nevertheless, having occurred outside the jurisdiction where such marriage was lawful the Florida Supreme Court held that it was lawful in Florida, and that property would pass just as though the marriage had been permissible under Florida law, stating:

> "Since the marriage was valid in the State of Kansas, where it was consummated and where the parties continued to reside until the death of the wife, we are of the opinion that neither our Constitution nor the statutes, referred to above, have any applicability thereto."

In no State where marriages have been prohibited and declared void, and even where they are punishable, have recognition of such marriages been refused *when* the marriage was legally performed in another jurisdiction where the parties were then domiciled and where the only question involved was the right of the surviving spouse to take property left by the deceased spouse in accordance with the principles of descent and distribution.

A very recent significant decision of the Supreme Court of California, *Estate of Wood*, 137 Cal. 129, is now drawn to the attention of the Court, an analysis of the case being as follows:

Plaintiff, claiming to be the surviving wife of the deceased, Joseph M. Wood, sought the family allowance provided by the laws of California. It was ob-

jected to on ground of her marriage being a nullity. Lower court denied relief.

Appellant and Wood were married in Reno, Nevada, on January 1, 1898, the marriage being valid according to the laws of that State. No evidence to show intent to violate California statute was offered. Both parties to the marriage were residents of California at the time of the wife's divorce from her former husband on August 19, 1897. *Section* 61, of the *Civil Code of California* provided:

> "A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:
>
> 1. The former marriage has been annulled or dissolved: provided, that in case it be dissolved, the decree of divorce must have been rendered and made at least one year prior to such subsequent marriage."

Appellee contended that appellant was not absolutely divorced until one year after the decree of divorce was rendered.

Judgment reversed.

Held (Justice Granville) (page 135):

> "Section 61, being general legislation prohibiting marriages between certain persons, has no extraterritorial operation . . . It cannot be possible that the legislature by this section attempted to declare what particular marriages contracted in the State of Nevada, or any other place in the world, would be invalid and void . . ."

Page 131:

> "At the outset it may be said that the policy of the law of the civilized world is to sustain the validity of marriage contracts. In this case an opposite conclusion to that declared by the majority of the Court would nullify hundreds of marriages, place the stamp of legitimacy upon scores of children, and change the source of title to great property interests. Unless the law points plainly to that end, such a conclusion should not be declared. And, as the Court views the law, it is not plain to that, but plain to the contrary . . ."

Beatty, Chief Justice, concurring, p. 137:

> "I concur in the judgment of reversal. *If the appellant is the widow of Joseph M. Wood, she is entitled to a family allowance.* If the Reno marriage was lawful in Nevada, it is valid here, and if at the date of the Reno marriage plaintiff was an unmarried person, the marriage was lawful in Nevada . . ." (Italics ours).

Ruling Case Law, Volume 5, p. 1002, Sec. 82:

> "No State goes so far as to refuse to recognize the validity of a marriage of white and colored people performed elsewhere, when the only question involved is the right to inherit property in the State having a prohibitory statute."

If, to state the proposition in the strongest terms, the statute in the District of Columbia had expressly declared that petitioner's marriage in Florida, under the circumstances stated in her petition was not only

prohibited but deemed void, nevertheless such marriage, having been celebrated legally in Florida, would nevertheless have to be recognized here. Marriage lawfully celebrated in another State, after the acquisition of a new domicile, is legal and must be so recognized in all other jurisdictions.

We refer again to the overwhelming collection of authorities brought forward and analyzed for the Court's information in Part II of our petition for certiorari herein, pages 7 to 53 inclusive, and repeat that these authorities establish the conclusion that the decision of the Court of Appeals herein was erroneous in every substantial conclusion: that it did violence to the well-settled law governing marriages in this jurisdiction and in the States; that it was inconsistent with the Court's own decisions and undertook to lay down a new and strange doctrine as to domestic relations for the City of Washington, utterly unknown to the laws of any State in the Union, and revolutionary in the history of the Courts of the District of Columbia. For such reasons it is respectfully submitted that the decree signed by Mr. Justice Bailey of the Supreme Court of the District of Columbia should in all respects be affirmed and the decision of the Court of Appeals reversed.

Robert H. McNeill,
Attorney for Petitioner.